No. ~~903~~. 42

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827.

BRIEF FOR FREDERICK H. CATTLEY, et al., as Amici Curiae.

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CITATIONS

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This brief is filed by agreement executed April 3, 1941 under Rule 27(9) on behalf of Frederick H. Cattley, Robert Cattley, John H. Cattley, Thomas F. Cattley, Kenneth M. Cattley, Helene A. Cattley, Isabel C. Hills, Bernard J. Wishaw, Lillian S. Wishaw, Mary I. Wishaw, Alice A. Wishaw and Winifred K. Wishaw, shareholders in the First Russian Insurance Company who are British citizens resident in London. The contentions of the respondent Superintendent of Insurance of New York are adopted by these shareholders and will not be restated here.

Opinions Below.

The opinion of the New York Supreme Court granting summary judgment dismissing petitioner's com-

plaint, will be found at R. 52 and is unreported. The unanimous memorandum decision of affirmance by the Appellate Division is reported in 259 App. Div. 871. The *per curiam* opinion of affirmance by the New York Court of Appeals is reported in 284 N. Y. 555. No rehearing or certificate was asked for in the highest state court.

Statement Against Jurisdiction.

The precise questions now raised by petitioner were decided adversely to it by this Court at the October Term, 1939, in *Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 161 Misc. 905, aff'd 253 App. Div. 644, aff'd 280 N. Y. 286, rehearing denied 280 N. Y. 848, certiorari granted 308 U. S. 542, aff'd 309 U. S. 624, rehearing unanimously denied 309 U. S. 697[1]. There are no questions raised, involved or decided below that were not finally set at rest by the decision in the *Moscow* case where the state courts found as a matter of fact that the identical confiscatory Soviet decrees under which petitioner claims as assignee did not extend to or embrace the New York assets of nationalized Russian insurance companies. Since that decision rested upon an adequate non-federal ground and the highest state court has held that there is no difference here (284 N. Y. 555), no reason exists why certiorari should now be granted to review the identical questions which this Court has heretofore decided adversely to petitioner.

The question is not, as petitioner claims, the failure of the state courts to recognize the Litvinoff assign-

[1] By the full Court. See Journal of March 25, 1940, No. 355, October Term, 1939.

ment of 1933, but instead the question of what, if anything, passed to petitioner thereunder. The *Moscow* case conclusively determined that nothing passed—as respects the New York assets of such insurance companies which were in fact wholly beyond the scope and effect of the Soviet nationalization decrees and which have been in the lawful custody of state authorities since 1925 pursuant to a state statute, the constitutionality of which is not challenged.

Statement.

Petitioner's statement (pp. 4-8) omits any mention of the context of the Soviet decrees under which it claims title as assignee, although admitting (pp. 2-3) that they are the identical decrees heretofore construed in the *Moscow* case. There the state court found as findings of fact (*Moscow Fire Ins. Co. v. Bank of New York and Trust Co.*, 309 U. S. 624 at R. 114-115):

"42. By a series of decrees issued by the Soviet Government in the end of 1921 and thereafter reenacted in substance by the Soviet Civil Code passed in October, 1922, but taking effect as of January 1, 1923, the effect of the nationalization decrees passed prior to 1921, including the decree providing for the nationalization of insurance enterprises was modified so as to apply only to such private property as was factually in the possession of the Soviet Government or organized toilers prior to May 22, 1922. * * *

45. Pursuant to said Soviet legislation of 1921 and 1922 limiting the effect of prior nationalization decrees, private property not factually in the

possession of or in the inventories of the Soviet government, its agents or representatives, was pursuant to the decision of the highest Soviet courts actually returned to its former owners.

46. The Soviet Government never claimed extraterritorial effect of any of its ~~naturalization~~ nation decrees, except those relating to the Russian Merchant Marine.

47. It is the law of Soviet Russia that the ownership of property is to be determined by the law of the place where the property is located.

48. The decree of November 28, 1918[2] did not purport or intend to vest the Soviet State with title to any assets outside of Russia of nationalized Russian Insurance Companies.

49. The intervenor has failed to prove that it was the purport and intent of the Soviet decree of November 28, 1918 to vest the Soviet State with title to property outside of Russia of nationalized Russian insurance companies.

50. The oral opinion expressed by the intervenor's witness on Soviet law to the effect that, as a matter of Soviet law, the decree of November 28, 1918 (Intervenor's Exhibit 7) transferred to the Soviet state the property outside of Russia of nationalized Russian insurance companies is without support in the evidence and is contrary to the documentary evidence herein."

The New York Appellate Division, in affirming these findings held, *per curiam* (*Moscow Fire Ins. Co. v. Bank of New York and Tr. Co.*, 253 App. Div. 644):

"The evidence adduced before the Referee sustains his finding 'That the Soviet decrees of con-

2 Petitioner conceded that this was the sole basis for its claim of title (309 U. S. 624 at R. 1939-1941).

fiscation against the assets of Russian insurance companies were not intended to apply to such assets as were situated outside of Russia and in the United States but were intended to apply only to such assets as were situated in Russia'."

The New York Court of Appeals, in turn affirmed and held (*id.* 280 N. Y. 286, 303, 314):

"Recognition of the Russian government has given to its decrees retroactively the force and effect of foreign law. • • • The question of the effect to be given to the foreign law within this State must be determined in accordance with the law of this State. Recognized principles of comity and international law or the control of international relations intrusted under the Constitution to the Federal Government are factors which at times dictate the content of the law of the State in such matters but foreign law is of effect here only insofar as the local law gives it effect. • • • The courts below have made the proper choice not because enforcement of confiscatory decrees situated elsewhere is contrary to our public policy but because under the law of this State such confiscatory decrees do not affect the property claimed here."

This Court affirmed this decision (309 U. S. 624). Rehearing was sought on the ground the affirmance was by a divided court[3] and it was unanimously[4] denied (309 U. S. 697, *Cf. Kobilkin v. Pillsbury*, 309 U.

3 In *United States v. Stone*, 308 U. S. 519, and *Helvering v. Johnson*, 308 U. S. 523, similar petitions were filed by the government and subsequently withdrawn.

4 Cf. *Hart v. United States* and *McQuillen v. Nat. Cash Register Co.*, Nos. 322 and 476 this Term where certain Justices did not sit on the rehearing applications.

S. 619, 695; *Brown v. Aspden*, 55 U. S. 25; *Shreveport v. Holmes*, 125 U. S. 694).

The confiscatory decree of November 28, 1918 was promulgated during the period of so-called "Military Communism" in Russia when a policy of destroying private enterprise and ownership was pursued. This policy was definitely discontinued as early as 1922 and, pursuant to the decrees of the All-Russian Central Committee of October 27 and December 10, 1921, "a rule was established that the enterprises as to which factual nationalization had not been carried out up to May 17, 1921, belong to their former owners, that is they are not subject to nationalization." (309 U. S. 624 at R. 1961).

In construing these 1921 decrees the People's Commissar of Justice and President of the Supreme Court of the R. S. F. S. R. held that all enterprises which had not in fact passed prior to May 17, 1921 into the ownership of the Soviet authorities "are recognized factually not nationalized and are deemed 'belonging to their former possessors' (that is former owners)" (*id.* at R. 1963). This interpretation was also applied by the Supreme Court of the R. S. F. S. R., the highest court in Russia (*id.* R. 1962)[5].

The various nations which have since extended diplomatic recognition to Soviet Russia have declined consistently to recognize or give exterritorial effect to the confiscatory decrees. In 1921, despite recognition, companies acts were passed in Esthonia, Latvia and Poland providing for the winding up locally of foreign corporations (*Zeitschrift fuer Ostrecht* (1927)

5 Cf. also the ruling of the Soviet Commissariat of Justice: "The general annulment of agreements of life insurance does not extend to the territories located without the borders of the Union of Soviet Socialist Republics and *particularly to the United States of North America*" (Id. at R. 856; italics ours).

1539, 56; *id.* (1928) 116). The same thing was done in Great Britain in 1929 despite diplomatic recognition there in 1924 (*In re Tsa Trading Co.*, L. R. (1933) Ch. 647; *In re Russian Bank for Foreign Trade*, *id.* 745; *In re Russo-Asiatic Bank*, L. R. (1934) Ch. 720; *Russian & English Bank v. Baring Bros. Ltd.*, L. R. (1936) A. C. 405). France, despite recognition in 1924, proceeded to liquidate the French branches of Russian nationalized corporations under Article 2 of the French Bankruptcy Act (*Russo-Asiatic Bank*, 56 Clunet 78, 1095; *Banque Internationale de Commerce de Petrograd*, 62 *id.* 125; *Societe de Banque de Volga Kama*, 62 *id.* 125; *Banque d' Russe pour le Commerce étranger*, 62 *id.* 128; *Banque d' Azoff-Don*, 62 *id.* 134; *Northern Russian Ins. Co. v. Union & Phoenix Ins. Co.*, 42 McNair 66). Germany has adopted a similar position (*Ginsberg v. Deutsche Bank*, 1 Ostrecht (1925) 163, 164), as have Switzerland (*Comptoire d' Escompte v. Sosnowice*, 1921 Semaine Judiciare 82; *Wilbuschewitch v. Zurich*, 53 Clunet 1110, 1113), Denmark (*Council of the Russian Orthodox Community in Copenhagen v. The Legation of the R. S. F. S. R. in Copenhagen*, Ann. Dig. of Int. L. Cases (1925-6) 24), Norway (*Russian Bank for Trade etc. v. Aktiebolaget Goeteborg's Bank* 25 Darres (1930) 695; *Re Second Russian Ins. Co.*, *id.* 697) and Greece (*Tribunal of Athens*, 52 Clunet 1111; *Court of Corfu*, 58 *id.* 752).[6]

Summary of Argument.

1. There is no conflict with *United States v. Belmont*, 301 U. S. 324, but even if such conflict existed it

6 For similar reliance on foreign law, see *Muller v. Oregon*, 208 U. S. 412, 419; *O'Malley v. Woodrough*, 307 U. S. 277, n. 6, 8, 9.

was resolved by the subsequent decision in *Moscow Fire Ins. Co. v. Bank of New York and Tr. Co.*, 280 N. Y. 286, aff'd 309 U. S. 624, rehearing denied unanimously in 309 U. S. 697.

2. The decision below was plainly and expressly based upon an independent and adequate non-federal ground—viz. the non-applicability of the foreign confiscatory decrees as a matter of fact and of state law to the assets of the First Russian Insurance Company physically situate in New York and which have been in the lawful custody of the respondent Superintendent of Insurance since 1925 pursuant to a valid liquidation in accordance with applicable local law.

3. Since the questions here presented were finally determined adversely to the petitioner and upon the merits after a plenary trial and six years of exhaustive litigation in the *Moscow* case, no good or sufficient reason now exists for review by this Court in the exercise of its discretion of the identical questions when raised on motion for summary judgment. The "confusion" claimed[7] exists, if at all, only because of petitioner's unwillingness to acquiesce in similar instances in the final decision of this Court in the *Moscow* case which, as noted, did not depend upon the validity or invalidity of the Litvinoff assignment.

I.

The decision of the highest state court does not conflict with United States v. Belmont, 301 U. S. 324.

The New York Court of Appeals said in the *Moscow* case (280 N. Y. 286, 308-9):

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7 *Bettman v. Northern Ins. Co.*, 134 O. S. 341; 344 relied on by petitioner has no application here. Cf. the opinion of the Ohio Court of Appeals, 27 O. L. A. 112 at p. 122, which was affirmed by the Ohio Supreme Court.

"In *United States v. Belmont (supra)* the Court was considering the sufficiency of pleadings which conclusively established that the United States was asserting, under assignment from the Soviet government, a claim to *intangible* property here of a Russian corporation which under Soviet decree had been confiscated by the government. (See opinion of Circuit Court of Appeals, 85 Fed. Rep. (2d) 542). The allegations in the complaint that under the decree the property of the corporation was confiscated by the Russian government and ther transferred to the American government were admitted by demurrer, and as the Court pointed out, were not open to challenge. Such cases in no wise support the appellant's contention here, where we are considering whether title to property in the custody of this State has been transferred *in invitum* from its owner to the Soviet government or is 'dependent' upon the law of Russia."

And in its *per curiam* decision herein, the highest state court said, speaking of the *Moscow* decision (284 N. Y. 555, 556-7):

"* * * The decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions this court should in determining title to assets of First Russian Insurance Company, deposited in this state, apply in this case the same rule of law which the court applied in the earlier case in determining title to the assets of the Moscow Fire Insurance Company deposited here."

The present judgment was entered on respondent's motion, made on affidavit, for summary judgment

dismissing the complaint under Rule 113 of the New York Rules of Civil Procedure and Section 476 of the New York Civil Practice Act. Respondent's moving affidavit established this case was identical with the claims disposed of by the *Moscow* decision (R. 14-17). Petitioner did not deny this but opposed solely on the ground the motion was premature since the *Moscow* case was then still pending (R. 50-51)—a contention now conclusively set at rest by the subsequent final affirmance in that case.

Under the governing state law which controls, where as here the allegations of the moving affidavit on a motion for summary judgment are uncontested, even the complaint cannot be adverted to as proof in opposition to the motion (*Gnozzo v. Marine Tr. Co. of Buffalo*, 258 App. Div. 298, aff'd 284 N. Y. mem. 49). This rule is binding here (*Erie R. Co. v. Tompkins*, 304 U. S. 64; *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202; *Fidelity Union Tr. Co. v. Field*, 311 U. S. ——). By this standard, petitioner's record here is fatally defective. The summary judgment motion was in effect unopposed and there is nothing that this Court can review since no federal question was raised on the record below.

Petitioner's suggestion (pp. 10-11) that the case was not properly one for summary judgment under the New York state practice is of course wholly unavailing here as a ground for certiorari. The highest state court decided otherwise, if (as is doubtful) this question was raised at all below, when it unanimously affirmed the final judgment of dismissal which had been appealed from (284 N. Y. 555).

II.

The decision of the highest state court was expressly based upon an adequate and independent non-federal ground.

This much appears from the *per curiam* opinion itself (284 N. Y. 555) which incorporates by reference the prior opinion in the *Moscow* case (280 N. Y. 286, 848) wherein, as noted, the *Belmont* case was expressly distinguished, and the decision squarely based upon the state law applicable to findings made that the foreign decrees relied upon (which were provable facts) did not embrace the tangible assets of nationalized Russian insurance companies which had been deposited in New York in accordance with the valid requirements of a state law (nowhere challenged) and which are in the lawful custody of New York state authorities. This is an adequate non-federal ground on which the judgment below is grounded so that in such instance either dismissal of the certiorari petition (*McGoldrick v. Gulf Oil Corp.*, 309 U. S. 2; *Utilities Ins. Co. v. Potter*, No. 625 this Term; *Tax Commission v. Wilbur*, 304 U. S. 544; *Lynch v. New York*, 293 U. S. 52, 54, 55; *Knights of Pythias v. Meyer*, 265 U. S. 30, 32, 33) or its denial (*Public Service Comm'n v. Wisconsin Tel. Co.*, 309 U. S. 657; *New York City v. Central Savings Bank*, 306 U. S. 661) is required.

In fact it has long been held in an unbroken line of state decisions that the domestic branch of a foreign insurance company transacting business in New York, for many purposes "must be treated as a domestic company and as domiciled in this state" (*Morgan v. Mut. Benefit Life Ins. Co.*, 189 N. Y. 447, 454; *Comey*

v. United Surety Co., 217 N. Y. 268, 273, 274; *Matter of People (City Eq. Fire Ins. Co.)*, 238 N. Y. 147; *James v. Rossia Ins. Co.*, 247 N. Y. 262, 265). No new or novel federal question is presented by this state court determination here nor will such question be found raised anywhere in the record below. Petitioner's suggestion (p. 3) that federal questions were raised in briefs and oral arguments in the state courts is of course unavailing here (*Lynch v. New York*, 293 U. S. 52, 54; *Zadig v. Baldwin*, 166 U. S. 485, 488).

The questions moreover were resolved wholly upon a construction of documentary evidence which this Court will not assume jurisdiction to construe (*Grayson v. Harris*, 267 U. S. 352; *St. Louis, Iron Mountain & So. R. Co. v. Craft*, 237 U. S. 648; *Willoughby v. Chicago*, 235 U. S. 45), particularly where the entire controversy has long since become moot by virtue of a prior decision on the same evidence and involving the identical basic facts and circumstances.

III.

No reason is advanced why the Moscow decision should now be overturned.

Nothing has intervened since the unanimous denial of rehearing in the *Moscow* case (309 U. S. 697) on March 25, 1940 or appears in the record herein that requires a review or reversal of that decision[8]. On the contrary, in the year that has intervened the menace of totalitarian and communistic doctrine is

[8] Cf. the petition for rehearing filed in the *Moscow* case where the various collateral grounds now urged to support *certiorari* were fully set forth (No. 355 October Term, 1939).

becoming increasingly apparent to the democracies who survive. The confiscatory Soviet decrees were expressly found in that case to be "public penal enactments" (309 U. S. 624 at R. 109, 110). Comity in our international relations does not extend to or require the enforcement of such penal decrees of another state (*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290; *Oklahoma v. Gulf &c. Ry. Co.*, 220 U. S. 290, 300; *Huntington v. Attrill*, 146 U. S. 657, 668; *Baglin v. Cusenier Co.*, 221 U. S. 580, 594, 596; *Ingenohl v. Olsen & Co. Inc.*, 273 U. S. 541, 544. This is also the New York rule (*Vladikavkazsky Ry. Co. v. New York Tr. Co.*, 263 N. Y. 369, 378-9; *Burth v. Backus*, 140 N. Y. 230, 239; *Frenkel & Co., Inc. v. L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 249).

The fact that petitioner now contends otherwise can not alter this rule since at most it is here but an assignee of the Soviets (*Guaranty Tr. Co. v. United States*, 304 U. S. 126, 134; *United States v. Buford*, 28 U. S. 12, 30) and this Court long ago declared that it would not sanction communistic doctrines of confiscation.

"The whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled" (*United States v. Percheman*, 32 U. S. 51, 86, 87). We are confident that it can not happen here. These friendly alien shareholders—our British allies—are equally entitled with our citizens to the protection of the due process clause (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489; *Hines v. Davidowitz*, 311 U. S. —n. 14). Nothing would be more abhorrent to our form of government than the suggested taking of one man's property and the giving it to another, no matter under what plausible

pretext it may be attempted (*Thompson, et al v. Consolidated Gas Utilities Corp*, 300 U. S. 55, 79).

Conclusion.

For these reasons it is respectfully submitted that the petition for a writ of certiorari should be either dismissed or denied—or, granted and the judgment below affirmed forthwith upon the authority of *Moscow Fire Insurance Co. v. Bank of New York and Tr. Co.*, 309 U. S. 624, 697.

April 19, 1941.

Albert G. Avery,
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